Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
RURAL CELLULAR ASSOCIATION	)	RM-11497
	)	
Petition for Rulemaking Regarding	)	
Exclusivity Arrangements Between	)	
Commercial Wireless Carriers and	)	
Handset Manufacturers	)	

REPLY COMMENTS OF THE RURAL CELLULAR ASSOCIATION

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SUMMARY

RCA believes that the information provided in this proceeding supports the conclusion that exclusive handset arrangements result in a very direct and negative effect on the competitive positions of smaller carriers relative to the largest national providers. The "Big 4" nationwide carriers – AT&T, Verizon Wireless, Sprint and T-Mobile – account for more than 90% of all wireless telephone subscribers in the United States. The market power of the dominant nationwide wireless carriers has been allowed to grow to the point where these nationwide carriers can, in nearly every case, dictate exclusivity terms to handset manufacturers. In addition, these carriers have made clear that they are currently unwilling to discontinue or modify their use of exclusive handset arrangements.

As a result, handset accessibility has become a primary concern for nearly every wireless carrier in the country – other than the nation's four largest carriers. If the nation's Tier II and Tier III wireless carriers are unable to get access to handsets that consumers have an interest in purchasing, the ability of these carriers to effectively compete with the nation's largest carriers is significantly harmed, thereby jeopardizing their ability to continue providing service in remote areas not adequately served by the "Big 4."

In many rural communities, customers have only one wireless service provider with extremely limited handset options – handsets which none of the "Big 4" carriers would ever attempt to sell to consumers today. As a result, the exclusive handset arrangements that prohibit smaller carriers from offering desired handsets to the communities they serve are, in many circumstances, relegating rural consumers to "second class citizens" in the wireless marketplace, since they are prevented from

accessing the most popular handsets and benefiting from the advances in wireless handset technology until years after their urban counterparts.

In addition, in communities served by the "Big 4" and with access to the most popular handsets, the absence of competition for a particular exclusive handset results in these consumers not only having to switch service providers, but having to pay a premium for their desired handset. Often times, these customers also must enter into multi-year service agreements with exclusive providers, presumably to offset handset subsidies, and end up paying a premium for the associated wireless services.

Unless the Commission takes action to stop the continuing unfair use of exclusive handset arrangements, smaller carriers will have only a limited ability to acquire the next generation of handsets for use on AWS spectrum. RCA is concerned that the nation's largest carriers, who are now able to dictate the terms and types of phones they want to purchase, may soon decide to steer handset manufacturers to support only the particular frequencies, air interfaces and spectrum bandwidths held by the largest carriers. This could, in turn, limit the ability of smaller carriers to deploy these handsets.

If small, rural and regional carriers are unable to buy handsets with 4G technology, such as LTE, they will be severely harmed in the future as they will not be able to compete against the largest carriers who already have access to more capital and, in some cases, better resources. The largest carriers must not be allowed to use their market power to deny competitors access to LTE handsets. Advanced wireless services – 3G and beyond – will only flourish if the Commission takes action now that prohibits such exclusive arrangements.

The Commission has explicit regulatory authority over the exclusive dealing contracts of wireless carriers. RCA cites to eight different provisions of the Act that allow the Commission to assert jurisdiction over exclusive handset arrangements, as well as multiple analogous proceedings in which the Commission asserted jurisdiction. Moreover, the Commission has already decided that it has the statutory power to regulate exclusive dealing contracts between cellular carriers and handset manufacturers.

In short, based upon the information provided to the Commission in this proceeding by those in support of *and opposed* to the RCA petition, the Commission should initiate a rulemaking to investigate the anticompetitive effects of exclusivity arrangements between commercial wireless carriers and handset manufacturers. RCA believes strongly that following its investigation, the Commission will conclude that the public interest is, in fact, being harmed by these arrangements. Given the gravity of the harms allegedly caused by these agreements, if that determination is made, the Commission must then promptly adopt rules that prohibit such arrangements consistent with the Commission's obligations under the Act.

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REPLY COMMENTS OF THE RURAL CELLULAR ASSOCIATION

Rural Cellular Association (RCA)[1] hereby submits these reply comments in response to the Commission's Public Notice seeking comment on RCA's petition. In its petition, RCA asks the Commission to initiate a rulemaking to investigate the widespread and anticompetitive effects of exclusivity arrangements between commercial wireless carriers and handset manufacturers and, as necessary, adopt rules that prohibit such arrangements when contrary to the public interest, consistent with its obligations under the Communications Act of 1934, as amended (the "Act").

Not surprisingly, the comments filed in this proceeding make clear that the nation's largest wireless carriers would prefer to keep their monopolistic handset arrangements in place. In fact, 8 of the 10 most popular handsets in the U.S. (as of November 2008) are exclusive to the nation's four largest wireless providers.[2] With

[1] RCA is an association representing the interests of approximately 100 wireless licensees providing commercial services to subscribers throughout the nation. RCA's wireless carriers primarily operate in rural markets. Most RCA's members serve fewer than 500,000 customers.

[2] *SeeSee* Kristen Beckman, *By the Numbers: Top 10 Most Popular U.S. Handsets in October*, RCR Wireless (Jan. 8, 2009) (http://www.rcrwireless.com/article/20090108/wireless/901079989/1081/newsletter33).

regard to the two popular handset models that are not considered "exclusives" – the latest model of one (RIM's Blackberry 8350i) appears only to be available from Sprint,[3] while the second (HTC's Touch Pro) appears only to be available from the nation's five largest wireless carriers.[4]

In contrast, RCA, its member carriers, every other small and mid-sized carrier and trade association, and seven consumer groups would prefer to see these exclusive arrangements end as quickly as possible and believe that the FCC has the legal authority to and should launch an investigation into the growing use of exclusive handset arrangements and adopt rules that prohibit their use so that handsets are offered on a non-discriminatory basis.[5] Even the Telecommunications Industry Association (TIA) – whose members include handset manufacturers – supports FCC action to investigate the use of exclusive handset arrangements.[6]

Handset accessibility has become a primary concern for nearly every wireless carrier in the country, other than the nation's four largest carriers. The market power of the dominant nationwide wireless carriers has been allowed to grow to the point where

[3] *See http://na.blackberry.com/eng/devices/blackberrycurve8300/curve_wheretobuy.jsp* (showing "Where to Buy" RIM's Blackberry Curve models in the United States, according to RIM).

[4] *See http://www.htc.com/www/where_to_buy.aspx?folderid=3806&page=0* (showing "Where to Buy" HTC's Touch Pro models in the United States, according to HTC).

[5] *See* Comments of the *Ad Hoc* Public Interest Spectrum Coalition; Comments of the Blooston Rural Carriers; Comments of California RSA No. 3 Limited Partnership D/B/A Golden State Cellular; Joint Comments of Cellular 29 Plus & Lyrix Wireless; Comments of Cincinnati Bell Wireless, LLC; Comments and Further Comments of Corr Wireless Communications, LLC; Comments of Jim Chen; Comments of MetroPCS Communications, Inc.; Comments of Nex-Tech Wireless, LLC; Comments of NTELOS, Inc.; Joint Comments of RTG, OPASTCO and NTCA; Comments of South Dakota Telecommunications Association; Comments of TCA, Inc. NTELOS Inc. asks the Commission to go one step further and examine the "locking" practices of national carriers which NTELOS alleges "compounds the difficulty that smaller carriers have in attracting customers from the national carriers" and "prohibit the programming of handsets in a way that prevents their use on other networks." *See* Comments of NTELOS, at 4-5.

[6] *See* Comments of the Telecommunications Industry Association.

these nationwide carriers can, in nearly every case, dictate exclusivity terms to handset manufacturers. Many of RCA's member carriers simply do not have access to handsets that are less than two years old – an eternity in the wireless industry.[7] If the nation's small and mid-size wireless carriers are unable to get access to handsets that consumers have an interest in purchasing, the ability of these carriers to effectively compete with the nation's largest carriers is significantly harmed. In addition, customers served by smaller carriers and new entrants are prevented from accessing the most popular handsets and benefitting from the advances in wireless handset technology until years after their urban counterparts.

The nation's largest carriers have made clear that they are currently unwilling to discontinue or modify their use of exclusive handset arrangements. Notwithstanding this unwillingness, it is also important to note that in an attempt to reach agreement among interested parties on the issues raised in the RCA petition or, at the very least, narrow the issues for Commission consideration, CTIA recently hosted a series of conference calls with its member carriers and manufacturers. A significant number of carrier and manufacturer representatives, as well as representatives of CTIA and RCA, participated in these calls.[8]

[7] *See e.g.*, Comments of Corr Wireless Communications, LLC, at 1-2 ("Often we are a year to two years behind the majors in getting access to new models from manufacturers. This severely crimps our ability to compete with the majors on handset devices, even though we are otherwise able to present consumers with an attractive alternative on price, coverage, flexibility of service, and customer service.").

[8] These calls were, in large part, the basis for the joint request made by RCA and CTIA to extend the comment and reply comment deadlines in this proceeding. *See Rural Cellular Association and CTIA-The Wireless Association Joint Request for Extension of Comment and Reply Comment Deadlines*, RM-11497 (filed Nov. 20, 2008); *see also Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers*, Order, RM-11497 (rel. Nov. 26, 2008) (extending the deadlines for filing comments and reply comments on RCA's exclusive handset petition).

Initially, technical concerns were raised during these conference calls by a minority of manufacturers about the ease of developing handsets that could be used by more than one carrier. RCA believes that many of those technical concerns were resolved on subsequent calls and does not believe that technical barriers would prevent the distribution of handsets on a non-exclusive basis.[9] Ultimately, the issue that remained irresolvable was the willingness of the four largest wireless carriers to discontinue or modify their use of exclusive handset arrangements. Once it became clear that these carriers were unwilling to modify their use of exclusive handset arrangements, the conference calls ended.

The "Big 4" nationwide carriers – AT&T, Verizon Wireless, Sprint and T-Mobile – account for more than 90% of all wireless telephone subscribers in the U.S.[10] Since the same date, there has also been significant consolidation in the wireless industry, including the mergers of T-Mobile and SunCom, Verizon Wireless and Rural Cellular Corporation, and Verizon Wireless and Alltel Wireless.[11] These mergers have further increased the

[9] This point was also confirmed by Verizon Wireless in its comments. *See* Comments of Verizon Wireless, at 25 ("If the Commission were to ban exclusivity agreements, wireless providers would likely offer an inventory of "generic" mobile handsets, available to any and all providers.").

[10] *See In the Matter of Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Thirteenth Report, WT Docket No. 08-27, DA 09-54, Table A-4: Top 20 Mobile Telephone Operators by Subscribers, (rel., Jan. 16, 2009); *see also* ***Verizon Wireless Completes Purchase Of Alltel; Creates Nation's Largest Wireless Carrier,*** accessible at http://news.vzw.com/news/2009/01/pr2009-01-09.html**;** iPhone boosts AT&T as traditional-voice revenues decline, Computer World.com, accessible at http://www.computerworld.com/action/article.do?command=viewArticleBasic&articleId=9126933; *Sprint Nextel loses 1.3 million subscribers*, Kansas City Star.com, accessible at http://sprintconnection.kansascity.com/?q=node/965; *T-Mobile USA Reports 32.8 million customers at the end of 2008*, Fierce Wireless, accessible at http://www.fiercewireless.com/press-releases/t-mobile-usa-reports-32-8-million-customers-end-2008.

[11] The elimination of Alltel Wireless from the wireless marketplace has been extremely damaging to the ability of smaller carriers to get access to handsets. As noted by MetroPCS, with over 13 million subscribers, "Alltel acted as a large purchaser of CDMA handsets without exclusivity which allowed many other carriers to gain access to the same handsets. With the merger of Alltel into Verizon, small, rural and

percentage of wireless telephone subscribers claimed by the "Big 4." The FCC is also in the process of reviewing yet another proposed merger involving AT&T and Centennial, a wireless carrier with approximately 1.1 million wireless subscribers. As noted by MetroPCS, "[a]s the largest carriers acquire more and more customers, this increased disparity will accelerate the ability of the larger carriers to demand more and more exclusivity agreements while ensuring that particular phones are unavailable for longer periods of time to smaller wireless carriers," thereby severely restricting the ability of smaller carriers to compete.[12]

The time has come for the Commission to look closely at the use of handset exclusivity arrangements and determine whether the growing use of these arrangements by the dominant carriers in the wireless industry harms the public interest. If, after a prompt and thorough investigation, the Commission decides that exclusive arrangements do, in fact, harm the public interest and are allowing the "Big 4" carriers to extend their dominant market power into the market for handsets,[13] RCA recommends that the Commission adopt rules that would prohibit such arrangements, consistent with its obligations under the Act.

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regional carriers will find it increasingly difficult to secure the newest and most popular handsets." *See* Comments of MetroPCS Communications, Inc., at 7.

[12] Comments of MetroPCS Communications, Inc., at 6.

[13] As noted by MetroPCS, since there are at most two major carriers per air interface and handsets are typically tied to air interfaces, both AT&T and Verizon Wireless have well over 50% of the market share of their respective air interface handset market. Once these largest carriers begin transitioning to LTE, their share of the handset market for what may be the sole air interface will be well above 50%. *See id.* at 12.

I. RCA BELIEVES THAT THE PROPER PROCEDURAL COURSE IS FOR THE COMMISSION TO IMMEDIATELY INVESTIGATE THE HARMS CAUSED BY EXCLUSIVE HANDSET AGREEMENTS

As set forth in RCA's petition, the proper procedural course is for the Commission to immediately investigate whether exclusive handset agreements are harming consumers and competition and then, if necessary, adopt rules that prohibit such arrangements. In light of RCA's petition and the assertions made, the Commission's investigation of exclusive handset arrangements should have already commenced. If, however, the Commission has not launched its investigation of these arrangements, it should utilize the record compiled in this proceeding to start such an investigation immediately.

If the Commission comes to the same conclusion as RCA – exclusive handset arrangements are harming the public interest – then the Commission should grant RCA's petition and proceed directly to a Notice of Proposed Rulemaking. The Public Notice issued by the Commission in this proceeding amounts to a Notice of Inquiry. Moreover, given the gravity of the alleged harms to consumers and small and mid-sized carriers by these exclusive handset agreements, there is simply no reason for the Commission to delay its decision regarding whether remedial action is necessary.

Some opposed to RCA's petition have argued that the petition is procedurally defective.[14] Of course, RCA goes to great lengths in its petition to show how its members and consumers generally have been adversely affected by exclusive handset arrangements and the claims made by RCA have been validated by academics and other

[14] *See* Comments of Sprint, at 2; Comments of Verizon Wireless, at 28, 31; Comments of the Telecommunications Industry Association, at 7.

carriers that support RCA's petition. For example, Jim Chen, Dean of the University of Louisville's Louis D. Brandeis School of Law, states:

> Restricting advanced handsets to specific carriers is an anticompetitive practice that harms the markets for mobile devices, handset-friendly software applications and wireless carriage itself. Handset exclusivity steers subscribers away from the nationwide carriers' competitors, not on the basis of price or service, but strictly on access to devices that would be available through other vendors (including unaffiliated equipment dealers as well as competing wireless service providers) in a market not distorted by the large carriers' oligopsonistic dominance of the market for handsets. The elimination of competition for the handsets raises those devices' prices. In turn, carriers with handset exclusivity arrangements recover higher device prices through higher subscription fees. As competition retreats and the leading carriers magnify their market power under the cover of those exclusivity arrangements, rival carriers lose the ability to discipline rates and motivate innovation throughout the industry.[15]

Similarly, Cincinnati Bell Wireless, states that "it has become increasingly difficult if not impossible for Cincinnati Bell Wireless to obtain the latest, technologically advanced and most desirable handsets for its subscribers because of the continued trend toward exclusive handset arrangements."[16] Cincinnati Bell Wireless also reports that "internal data indicates that it experienced a 35% higher churn rate in the second six months of 2008 than in the first six months, a period during which a number of exclusive handsets and smartphones like the 3G iPhone and Blackberry Storm… were launched."[17] Consistent with the views expressed by Jim Chen, Cincinnati Bell Wireless and other

[15] Comments of Jim Chen, at 9-10.

[16] *See* Comments of Cincinnati Bell Wireless, LLC, at 3.

[17] *Id*., at 3-4. Cincinnati Bell Wireless also notes that the results of a random survey it conducted in December 2008 further highlight the importance of handsets to customers who have ported from Cincinnati Bell Wireless to another provider. When asked: "About your new cell phone carrier. What is the most appealing thing about your new service?," 42% chose "phone selection" over price, features of service, and friends/family being on the same network. And of those who cited "phone selection" as the basis for their switch, 35% of customers identified the Apple iPhone and 10% identified the Blackberry Storm as their new handset. *Id*. Verizon Wireless also cites a study that states that the number of consumers choosing a carrier based on handsets has grown by 51% since 2004. *See* Comments of Verizon Wireless, at 23 (citing Lowenstein, "Evolving Role of Handsets," at 4).

proceeding participants, RCA believes that the information provided supports the conclusion that exclusive handset arrangements result in a very direct and negative effect on the competitive positions of smaller carriers relative to the largest national providers.[18]

However, to the extent that there are procedural concerns by any party or the Commission concerning RCA's petition because it does not contain a proposed rule for Commission consideration, RCA will include it in these reply comments. Specifically, RCA proposes that the Commission adopt a rule that could be codified in Part 20 of the Commission's Rules that states:

> No commercial mobile service provider, and no agent or representative thereof, shall enter into any exclusivity arrangement with any handset manufacturer or handset vendor, or any agency or representative thereof.[19]

II. THE RECORD IS CLEAR THAT CONSUMERS ARE HARMED BY EXCLUSIVE HANDSET AGREEMENTS

The majority of commenters state that consumers are harmed by exclusive handset agreements. Perhaps most notable in making this proclamation is the *Ad Hoc* Public Interest Spectrum Coalition (PISC), a coalition that includes the Consumer Federation of America, Consumers Union, Free Press, Media Access Project, the New America Foundation, Public Knowledge and U.S. PIRG. PISC states affirmatively that

[18] A recent study commissioned by Google Inc. found that more than one in two wireless shoppers said handsets played a major role in their purchase decisions. Specifically, "24% said their decision-making was solely a function of the handset; 28% said both handset and carrier influenced their decisions." *See Proof that Handset Brands Help Sell Wireless Plans*, RCRnews.com (dated Oct. 28, 2008).

[19] In response to Verizon Wireless' concern that about defining the term" exclusivity arrangements," RCA proposes to define the term "exclusivity arrangement" in Section 20.3 of the Commission's rules to mean any contract or agreement between any commercial mobile service provider (or any agent or representative thereof) and any handset manufacturer or handset vendor (or any agent or representative thereof) in which a handset manufacturer or handset vendor provides exclusive rights to the marketing or sale of a particular telecommunications handset model or models to one commercial mobile services provider (or any agent or representative thereof) in the United States. RCA defers to the Commission for the appropriate definitions of the term "handset manufacturer," "handset vendor," and telecommunications handset." *See* Comments of Verizon Wireless, at 29.

"exclusivity arrangements between commercial wireless carriers and handset manufacturers… limit consumer choice over devices and providers."[20] PISC notes that "[f]ollowing a series of mergers of major nationwide and regional wireless carriers, the market for wireless services in 2009 demonstrates ever lower levels of competition."[21] PISC states that:

> The unique market dynamic associated with exclusivity provisions exaggerates the harms of consolidation by providing consumers with an undesirable choice between the service offered by a less expensive or higher quality rural or small wireless carrier, and service offered by a larger provider who may not offer the best service or the best rate but who offers the latest in popular wireless devices... Breaking open handset exclusivity arrangements would allow consumers to purchase new and popular wireless devices with any carrier, which would in turn break the control any individual carrier might be able to exert over the development and features of new devices, and would result in increased innovation for wireless devices.[22]

The absence of competition for a particular exclusive handset results in customers not only having to switch service providers, but also having to pay a premium for their desired handset.[23] Often times, customers also must enter into multi-year service

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[20] *See* Comments of *Ad Hoc* Public Interest Spectrum Coalition, at 1.

[21] *Id*., at 2. In making this point, PISC notes that the FCC's 11th CMRS Competition report showed that the HHI level in all of the top 25 wireless markets nationwide had increased in 2006, and that the 12th CMRS Competition report indicates that there has been no improvement.

[22] *Id*., at 3-4.

[23] By way of example, at its introduction, Apple's iPhone was priced at $499.00 for the 4GB model and $599.00 for the 8GB model – premium prices that clearly reflected the lack of competition in the handset market at the time. Approximately 10 weeks after introduction of the iPhone, Apple dropped the 4GB version of its iPhone and slashed the price on the 8GB model to $399 – $200 less than its introductory price. Even Sprint acknowledges that consumers are required to pay a premium for exclusive handsets when they are initially offered. *See* Comments of Sprint, at 6 ("Customers also recognize that new product introductions often involve a premium price…"). *See also* Joint Comments of RTG, OPASTCO and NTCA, at 3 ("…exclusive arrangements mean higher prices for those who are able to purchase premium handsets because the carriers who benefit from such exclusivity face no competition that would drive the price of such handsets down."; Comments of Cincinnati Bell Wireless, at 4-5. Of the 290 respondents to a Cincinnati Bell Wireless survey, approximately 40% indicated that they were paying more for service with their new provider than they had with Cincinnati Bell Wireless. *Id.*, at 5.

agreements with exclusive providers, presumably to offset handset subsidies, and end up paying a premium for the associated wireless services as well.

The three commenters that oppose RCA's petition claim that there is significant competition in the wireless handset market that benefits consumers and, to back their claim, cite to a CTIA report claiming that the U.S. handset market includes more than 620 unique wireless devices that are available for sale to consumers in the United States, with at least 35 companies designing and making handsets for the U.S. marketplace.[24] RCA does not take issue with these figures. However, the vibrant competition that these parties claim exists in the U.S. wireless handset market is limited almost exclusively to the nation's four largest national carriers. In reality, only a small fraction of these devices are available to smaller carriers and, typically, the devices that are made available to smaller carriers have already been available to consumers from one of the "Big 4" national carriers – in many cases for more than 12 months – as part of an exclusive arrangement.

To that point, Sprint's reported "examination" of the websites for some (*i.e.*, two) smaller, regional wireless operators, Centennial (which is not even an RCA member) and U.S. Cellular – both of which claim spots in the Top 10 list of largest U.S. wireless service providers – is not at all indicative of the extremely lean selection of handsets offered by the majority of RCA members.[25] In addition, Sprint's claim that "[c]ustomers

[24] *See e.g.*, Comments of Sprint, at 5 (citing CTIA, *Ex Parte* Communication, WT Docket No. 08-27, at 1 (Mar. 20, 2008)); Comments of AT&T Inc., at 14; Comments of Verizon Wireless, at 12.Sprint

[25] By way of comparison, please visit the websites of the following RCA members – all of whom have participated in this proceeding: Bluegrass Cellular (http://www.bluegrasscellular.com/phones); Cellular 29 Plus (http://www.cellular29plus.com/products/phones.php); Corr Wireless (http://www.corrwireless.com/Phones.aspx); Golden State Cellular (http://www.goldenstatecellular.com/cellular_phones/golden_state_cell_phones.html); Nex-Tech Wireless

who are not within the territory served by a given wireless operator and thus cannot buy a handset and service from that operator are not harmed by the operator's exclusive handset arrangements [] because there are *many other* handsets available from other sources, including operators and other vendors,"[26] is a position only a nationwide carrier with little regard for rural consumers could advance.

Similarly, AT&T's claim that "[a]ll wireless consumers, even those that do not have an iPhone and have not subscribed to AT&T's mobile service, have [somehow] reaped enormous benefits from the handset" is ludicrous.[27] In making this egocentric proclamation, AT&T glosses over the fact that many rural consumers – in significant portions of more than 15 states – still cannot activate and "legally" use the iPhone,[28] nor can many of these same consumers get access to any of the other handsets cited by AT&T claims "are expressly marketed as iPhone substitutes."[29] In short, millions of rural consumers would likely disagree with AT&T's self-serving declaration. In fact, in many rural communities, rural customers have only one wireless service provider[30] with extremely limited handset options – handsets which none of the "Big 4" carriers would

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(http://www.nex-techwireless.com/Document.aspx?id=304); Thumb Cellular (http://www.thumbcellular.com/phones.asp?id=ALL).

[26] *See* Comments of Sprint, at 7-8.

[27] *See* Comments of AT&T Inc., at 21.

[28] As highlighted in RCA's petition, AT&T's policy is to terminate subscriber's who violate the terms of AT&T's contract prohibiting customers from spending more than 40% of their time on non-AT&T networks. When that happens, according to AT&T, service is automatically canceled after 4 months. AT&T's standard contract also requires that iPhone users live in a community that receives direct service. *See* RCA Petition, at 6-7.

[29] *See* Comments of AT&T Inc., at 15.

[30] *See* 13th CMRS Competition Report, Map B-2: Wireless Coverage by Number of Providers (demonstrating the geographic areas that remain unserved or are served by only more wireless provider.

ever attempt to sell to consumers today. As a result, the exclusive handset arrangements insisted upon by the "Big 4" carriers that prohibit smaller carriers from offering desired handsets to the communities they serve are, in many circumstances, relegating rural consumers to "second class citizens" in the wireless marketplace.

It is worth noting that the Conseil de la Concurrence ("Competition Council") in France temporarily suspended an exclusive handset agreement between France Telecom and Apple which gave French operator Orange the exclusive right to sell the Apple iPhone for a five-year period.[31] According to press reports, the Council determined that "France Telecom's five-year deal with Apple . . . adds another obstacle for consumers in a market already suffering from a lack of competition."[32] The Competition Council's action is interim pending an investigation of the agreement between Apple and France Telecom which is not expected to be completed until 2010. To prevent other abusive arrangements in the interim, the Council ruled that any future exclusivity deals would be limited to three months duration.[33]

III. THE RECORD IS CLEAR THAT SMALLER COMPETITORS AND NEW ENTRANTS ARE ALSO HARMED BY EXCLUSIVE HANDSET AGREEMENTS

The biggest obstacle for small carriers and new entrants in competing with the "Big 4" carriers is overcoming a customer's or potential customer's desire to purchase a

[31] *See* Conseil de la Concurrence, Decision No. 08-MC-01, Dec. 17, 2008, *aff'd*, Paris Court of Appeals, (Feb. 4, 2009).

[32] *See* Dianne See Morrison, *France Telecom exclusive deal to sell iPhone in France banned*, MOCONEWS.NET, Dec. 17, 2008 (http://www.moconews.net/entry/419-france-telecom-exclusive-deal-to-sell-iphone-banned/).

[33] *See also* Further Comments of Corr Wireless Communications, LLC, at 2 ("The swift remedial action taken by the French regulatory authority should serve as a bellwether for the Commission. By prohibiting the exclusive deal, millions of French consumers gained immediate access to a useful handset device").

specific exclusive handset that the smaller carrier or new entrant is unfairly prohibited from selling to customers.[34] Handset exclusivity arrangements threaten the ability of Tier II and Tier III wireless carriers and new entrants to compete effectively with nationwide carriers, thereby jeopardizing their ability to continue providing service in remote areas not adequately served by the nationwide carriers.[35] By way of example, through its exclusivity arrangement with Apple, AT&T has been able to leverage its exclusive arrangement into its services market to gain subscribers from other carriers. This demonstrates an ability to acquire subscribers that small, rural and regional carriers simply do not have, thereby creating an unfair advantage for the "Big 4."

Unfortunately, as noted by Cincinnati Bell Wireless, only the largest national providers have the significant customer bases necessary to leverage exclusivity arrangements from the manufacturers – a competitive disparity that grows even greater with every wireless carrier merger.[36] Thus, it is not surprising that in providing a list of

[34] *See* Comments of California RSA No. 3 Limited Partnership D/B/A Golden State Cellular, at 2-3 (noting that Golden State is frequently unable to attract new customer or retain an existing customer because of its inability to carry a popular handset); *see also* Comments of NTELOS Inc., at 4 ("Although NTELOS offers handsets with similar features, it is an uphill battle to convince consumers to try a handset other than those that are heavily advertised. Consequently, even with very competitive rate plans and services, NTELOS loses a significant number of sales opportunities because we are unable to offer the exclusive handsets."); Comments of Bob Mauer, General Manager, Cellular 29 & Lyrix Wireless, at 1 ("The inability to secure and purchase quality, competitive handsets in a timely manner is by far the most difficult competitive hurdle I have to deal with."); Comments of MetroPCS Communications, Inc., at 8 ("Many new entrants do not have the scale or scope to overcome the exclusive arrangements negotiated by the dominant carriers, which means that new entrants will be left with non-exclusive handsets.").

[35] *See* Comments of the Blooston Rural Carriers, at 1. Several commenters also state that exclusive arrangements impede the ability of Tier II and Tier III wireless carriers to obtain an adequate selection or supply of the devices they need to achieve compliance with FCC regulatory mandates such as hearing aid compatibility (HAC) and to provide E911 service. *See, e.g.*, Comments of the Blooston Rural Carriers, at 1-2, 7; Comments of Cincinnati Bell Wireless LLC, at 6; Comments of Corr Wireless Communications LLC, at 2-4; Comments of MetroPCS Communications, Inc., at 4, 10-11; Joint Comments of RTG, OPASTCO and NTCA, at 3; Comments of South Dakota Telecommunications Association, at 1, 6-7.

[36] Comments of Cincinnati Bell Wireless, at 3 ("…exclusive handset arrangements enable the nation's four largest carriers to corner the market on the newest devices, relegating smaller competitors and their customers to "the out-of-date and the second-rate.").

examples of "New and innovative mobile services and devices launched during the past year," the only examples cited by the Commission in its most recent CMRS Competition Report, included offerings from or affiliated with one of the four national wireless carriers.[37]

While handset manufacturers used to be driven to sell as many handsets as possible to any wireless provider, exclusive handset arrangements prevent manufacturers from selling handsets subject to such agreements to the exclusive providers' competitors. As a result, many of RCA's member carriers simply do not have access to handsets that are less than two years old.[38]

The harmful competitive impact that a two-year delay can have on a carrier was never made more clear than following Sprint's decision to delay rollout of the Motorola RAZR handset. In discussing the marketing evolution of the RAZR, Sprint notes that it did not begin offering the RAZR to customers until approximately two years after Cingular Wireless. Many have claimed that Sprint's delay in offering the RAZR was a significant miscalculation by the company and is, in part, responsible for the company's declining market position.[39] Of course, Sprint's decision to delay introduction of the

[37] *See* 13th CMRS Competition Report") at ¶ 2. The examples cited by the Commission were: (1) a mobile TV service launched by AT&T using Qualcomm's MediaFLO network that the Commission stated rivaled a service already offered by Verizon Wireless using the same network; (2) the Apple 3G iPhone, launched by AT&T in July 2008 which runs on AT&T's WCDMA/HSDPA network, allowing it to navigate the Internet at much faster speeds than the original iPhone; (3) the App Store – an online software clearinghouse that sells third-party applications and content developed for the iPhone using a software development kit released by Apple; and (4) Google and T-Mobile unveiling of the T-Mobile G1 in September 2008 – one month after the Commission approved the first Android-based phone.

[38] *See e.g.*, Comments of Corr Wireless Communications, LLC, at 1-2.

[39] *See After Sprint and Nextel Merge, Customers and Executives Leave*, Wall Street Journal, by Amol Sharma (Oct. 11, 2006) ("Under Mr. Forsee, Sprint failed to latch onto a major trend in the handset market, the Razr phone. Cingular offered the phone first, in November 2004, heavily marketing it in TV ads. It caught on quickly, and as sales soared, other carriers took notice. By late 2005, Verizon Wireless put out its own Razr. In the past six months, the Razr has been the most popular handset on the U.S. market by far,

RAZR was by choice. In contrast, the delays experienced by RCA member carriers desperately wanting to introduce the latest and most advanced handsets to their communities are not by choice. Unfortunately, delays of two years from a handset's introduction until the same handset makes its way to RCA member carriers are, though unfair, a part of business that RCA member carriers simply must currently find a way to overcome.

IV. CLAIMS THAT EXCLUSIVE HANDSET ARRANGEMENTS FURTHER TECHNOLOGICAL DEVELOPMENT ARE WITHOUT MERIT

Parties opposed to the RCA petition state that exclusive contracts play a crucial role in differentiating one wireless carrier from another and in facilitating the development of new and innovative products.[40] As RCA noted in its petition, the "Big 4" carriers can distinguish themselves in the marketplace in a variety of ways – *e.g.*, lowest price plans, best coverage, superior customer service, unique services and features – and still be successful in the marketplace without resorting to exclusivity arrangements.[41]

With regard to the point advanced by parties opposed to RCA's petition that exclusive handset arrangements are necessary to furthering the technological development of handsets, these commenters fail to provide evidence that substantiates their position. According to Jim Chen,

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getting a 10% overall market share, according to surveys conducted by Telephia Inc., which tracks data on the wireless industry. Sprint decided to back two Razr look-alike phones. In late 2005, the company released the Samsung A900, dubbed "The Blade" by some bloggers. In July of this year, the company put out the Sanyo Katana -- named after the Japanese word for "sword." Both had the same sleek flip-phone design of the Motorola device. But now Mr. Forsee has decided to put the Razr in Sprint's stores later this year as well."); *see also Sprint Profit Falls*, International Business Times (Aug. 4, 2006) ("Sprint, which uses both the Sprint and Nextel brand, has been criticized for having a confusing marketing message and for failing to sell one of the market's most popular cell phones, Motorola Inc.'s flagship Razr phone.").

[40] *See* Comments of Sprint, at 11-13 ; Comments of AT&T Inc., at 2-3; Comments of Verizon Wireless, at 5.

[41] *See* RCA Petition, at 14.

> The practice of subsidizing the initial price of a handset in exchange for subscription fees on wireless services arises from American commercial practices rather than technological necessity… For reasons of control, convenience and profitability rather than technological compulsion, the largest American wireless carriers have become heavily involved in the design, manufacturing, and distribution of mobile devices. The resulting cluster of economic arrangements connecting handset manufacturers to wireless carriers, all traceable to these carriers' stranglehold over handset sales, has had a profoundly negative impact on competition, innovation and consumer welfare.[42]

While claims that the iPhone influenced the development of competitive models from multiple vendors, such as the Samsung Instinct (offered by Sprint) and the Blackberry Storm (offered by Verizon Wireless), are likely accurate, no party claims that *but for* the iPhone, other innovative handsets would not have been developed. Similarly, TIA provides absolutely no support for its claim that a revenue-sharing model between manufacturers and carriers is somehow necessary to create and speed development time for innovative devices and features is without support.[43]

In reality, handset manufacturers have been forced to accept such exclusive arrangements in the U.S. due to the dominant market power exerted by the nation's largest wireless carriers. Manufacturers have told RCA members that they would actually prefer to be able to sell their handsets to as many carriers as possible so as to increase sales, but are prohibited from doing so by the exclusive arrangements that they are forced into by the largest wireless carriers.

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[42] Comments of Jim Chen, at 4-6; *see also* Elliot Drucker, *Handset Distribution: The Technology "Gatekeeper,"* Wireless Week (July 15, 2008) ("By far the biggest impediment to commercialization of innovative wireless data products and services lies in the way mobile handsets are distributed in the U.S. market. Neither "lack of wireless data capacity," nor "[l]ack of uniformity among data networks," nor "[p]oor business modeling" evidently imposes a bigger barrier to entry and innovation than the simple fact that they typical wireless carrier asserts "almost absolute control over the brands and models of handsets sold for operation on its network.").

[43] Comments of the Telecommunications Industry Association, at 10.

RCA is not blind to the fact that large carriers like Verizon Wireless, AT&T, Sprint and T-Mobile and handset manufacturers spend considerable economic and administrative resources developing their exclusive handsets. However, RCA member carriers, through consortiums like the Associated Carrier Group, are also prepared to spend millions of dollars to develop handsets with multiple manufacturers and have been turned away because, according to manufacturer representatives, they are precluded from working with smaller carriers due to the expansive exclusive restrictions placed on them by the nation's largest carriers.

As a result, RCA member carriers are now routinely faced with an inability to get access to certain popular handsets for more than 12 months after the handset's initial introduction and, in a minority of cases, for the lifetime of a particular handset.[44] These obviously anticompetitive practices hurt smaller competitors and the consumers they serve and, consistent with the Commission's obligations under the Act, require a prompt and thorough investigation by the Commission. Ultimately, if following its investigation, the Commission concludes that such arrangements are contrary to the public interest, the Commission must adopt rules that prohibit such arrangements.

V. THE COMMISSION HAS TITLE II JURISDICTION TO REGULATE THE EXCLUSIVE DEALING CONTRACTS OF CMRS PROVIDERS

Predictably, three of the "Big 4" carriers attempt to throw up jurisdictional obstacles to the exercise of the Commission's authority to initiate a rulemaking to address the discriminatory and anticompetitive effects of exclusive dealing contracts between the nation's largest wireless carriers and handset manufacturers. Verizon Wireless

[44] By way of example, Vodafone and Verizon Wireless were granted a worldwide lifetime exclusive on the Blackberry Thunder. Apple is reported to have granted AT&T a five-year exclusive in the U.S. on the iPhone.

erroneously contends that no provision of the Act authorizes the Commission to regulate "agreements for exclusive marketing of specific handsets in supply contracts between equipment vendors and wireless service providers."[45] Sprint incorrectly claims that §§ 201 and 202 of the Act do not apply to contracts between carriers and handset manufacturers.[46] AT&T agrees with its competitors and mistakenly thinks that RCA's request for a rulemaking "boils down to a plea for an assertion of ancillary Title I jurisdiction."[47] The fact of the matter is that the Commission has been explicitly given regulatory authority over the exclusive dealing contracts of wireless carriers.

A. The Commission Has Rulemaking Authority Under §§ 4(i), 201(b), 211(b), 215(c), and 303(r) of The Act

RCA has not asked the Commission to assume jurisdiction to regulate equipment vendors generally or handset manufacturers specifically. Rather, it is asking the Commission to exercise its existing Title II jurisdiction over commercial mobile service ("CMRS") providers,[48] and the contracts of CMRS carriers,[49] particularly their "[e]xclusive dealing contracts."[50] We will show how those provisions give the Commission jurisdiction over the "procurement practices" of carriers subject the Act.[51]

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[45] Comments of Verizon Wireless Requesting Dismissal or denial of petition, RM-11497, at 4 (Feb. 2, 2009) ("VZW Comments').

[46] *See* Comments of Sprint, at 14.

[47] *See* Comments of AT&T Inc., at 34.

[48] *See* 47 U.S.C. § 332(c)(1)(A),

[49] *See id.* § 211(b).

[50] *See id.* § 215(c).

[51] *Regulatory Policies and Internat'l Telecommunications*, 4 FCC Rcd 7387, 7408 (1988).

Cellular carriers obviously are CMRS providers.[52] CMRS providers in turn are common carriers subject to Title II.[53] Therefore, cellular carriers must comply with thirteen Title II sections, specifically including §§ 201 and 202.[54] Accordingly, all practices of cellular carriers "for and in connection with" their communications services are subject to the Commission's Title II jurisdiction.[55]

Section 201(b) gives the Commission authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [the Act]."[56] The Supreme Court has held that "the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act.'"[57] Rejecting arguments that the Commission's rulemaking authority is limited to purely interstate or foreign communications matters, the Court emphasized that "even though 'Commission jurisdiction' always follows where the Act 'applies,' Commission jurisdiction (so-called 'ancillary' jurisdiction) *could* exist even where the Act does *not* 'apply.'"[58] Because Title II of the Act clearly applies to carrier contracts, the Commission's rulemaking authority extends to carrier practices in connection with their cellular services, including their contract practices.

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[52] *See* 47 C.F.R. § 20.9(a)(7); *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1218 (D.C. Cir. 1999).

[53] *See* 47 U.S.C. § 332(c)(1)(A); *Orloff v. FCC*, 352 F.3d 415, 419 (D.C. Cir. 2003)

[54] *See* 47 C.F.R. § 20.15(a).

[55] *See id.* §§ 201(b) & 202(a).

[56] *Id.* § 201(b). *See also id.* §§ 154(i) & 303(r).

[57] *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378 (1999).

[58] *Id.* (emphasis in original).

Section 211(a) of the Act requires that every subject carrier file with the Commission its contracts with other carriers, whether subject to the Act or not, concerning any traffic affected by the provisions of the Act.[59] Section 211(b), however, gives the Commission the "authority to require the filing of *any other contracts* of any carrier."[60] The Commission has determined that it will forbear from applying the inter-carrier contract filing requirement of § 211(a) to CMRS providers.[61] But the Commission made no such determination with respect to its authority under § 211(b) to require CMRS providers to file contracts other that those with carriers, including exclusive dealing contracts with handset manufacturers.

The Commission's authority to require the filing of a carrier contract under § 211 gives it authority to modify the terms of the contract under the *Sierra-Mobile* doctrine.[62] For all contracts filed with the Commission, "it is well-established that 'the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful and to modify other provisions of private contracts when necessary to serve the

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[59] *See* 47 U.S.C. § 211(a).

[60] 47 U.S.C. § 211(b) (emphasis added).

[61] *See Implementation of §§ 3(n) and 332 of the Communications Act*, 9 FCC Rcd. 1411, 1480 (1994) ("*CMRS Forbearance*"); 47 C.F.R. § 20.15(b)(1). Under Title III, the Commission is authorized to "specify by regulation" the Title II provisions (except §§ 201, 202 and 208) that are inapplicable to CMRS providers. *See* 47 C.F.R. § 332(c)(1)(A). But under Title I, it can forbear from applying any regulation or provision of the Act to CMRS providers. *See id.* § 160(a). The Commission must make the same three determinations prior to exercising its forbearance authority under Title I or Title III. *Compare id.* § 160(a)(1)-(3) *with id.* § 332(c)(1)(A)(i)-(iii). However, a Commission determination that it can forbear from enforcing a Title II provision assumes that it has jurisdiction. Thus, for example, the Commission's decision that it will not apply § 211(a) to CMRS providers does not mean that it is without authority to enforce § 211(a) against them should circumstances warrant. If its authority under § 211(a) is needed, the Commission would have to conduct a rulemaking in order to regulate under that provision. *See CMRS Forbearance*, 9 FCC Rcd. at 1484.

[62] *See Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348, 353-55 (1956) and *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 344 (1956). The *Sierra-Mobile* doctrine refutes AT&T's claim that "it would be entirely unlawful for the Commission to abrogate *existing* exclusive agreements." AT&T Comments, at 35 (emphasis in original).

public.'"[63] Thus, the Commission's authority to require wireless carriers to file exclusive dealing contracts with handset manufacturers provides it with ample authority to regulate the terms of such contracts.[64]

Under § 215 of the Act, the Commission has the obligation to examine "transactions entered into by any common carrier which relate to the furnishing of equipment … to such carrier and/or which may affect the charges made or to be made and/or the services rendered or to be rendered by such carrier."[65] The Commission decided not to forbear from applying its authority under § 215 to CMRS providers.[66] It decided that the exercise of its authority to examine the activities and transactions of CMRS carriers "may be necessary for the protection of consumers if some market failure occurs" and there was no public interest reason to limits its ability "to act if the need arises."[67]

One of the powers retained by the Commission was its authority under § 215(c) to regulate "[e]xclusive dealing contracts."[68] Under § 215(c), the Commission is empowered to "examine all contracts of common carriers subject to [the Act] which prevent the other party thereto from dealing with another common carrier subject to [the Act]."[69] Although § 215(c) provides that the Commission must report its findings as to

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[63] *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1231 (D.C. Cir. 1999) (quoting *Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987)).

[64] *See Cable & Wireless*, 166 F.3d at 1231-32.

[65] 47 U.S.C. § 215(a).

[66] *See CMRS Forbearance*, 9 FCC Rcd at 1484.

[67] *Id.*

[68] 47 U.S.C. § 215(c).

[69] *Id.*

exclusive dealing contracts to Congress with its recommendation for legislation,[70] the provision does not preclude the Commission from exercising its rulemaking authority under §§ 154(i), 201(b) and 303(r).[71]

In *GTE*, the court upheld that Commission's initial foray into regulating the provision of computer data processing by communications common carriers.[72] After finding that the Commission had jurisdiction under § 1 of the Act to ensure that carriers provide efficient and economic service,[73] the court rejected the notion that the Commission had to wait for evidence that the carriers' activities were actually abusive and then proceed on an adjudicatory basis rather than by rulemaking.[74] In that context, the court addressed the authority granted the Commission under § 215 of the Act:

> Several of the petitioners have urged that rule-making here is implicitly fore-closed by 47 U.S.C. § 215 (1970) which directs the Commission to examine into carrier activities and transactions likely to adversely affect the ability of a carrier to render adequate service to the public and to report any findings to Congress along with recommended corrective legislation. We do not agree. In view of the Commission's broad responsibilities, we cannot believe that Congress intended by this section to preclude rule-making in the area of the Commission's prime concern — adequate public communications service. Had Congress wished to impose such a

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[70] *Id.*

[71] *See GTE Service Corp. v. FCC*, 474 F.2d 724, 731 n.9 (2d Cir. 1972).

[72] *See Computer Use of Communications Facilities*, 28 F.C.C. 2d 267 (1971).

[73] *See GTE*, 474 F.2 at 730 (citing 47 U.S.C. § 151). With respect to jurisdiction, the court specifically held that "even absent explicit reference in the statute, the expansive power of the Commission in the electronic communications field includes the jurisdictional authority to regulate carrier activities in an area as intimately related to the communications industry as that of computer services, where such activities may substantially affect the efficient provision of reasonably priced communications service." *Id.*, at 731.

[74] *See GTE*, 474 F.2d at 731-32.

> limitation on its expansive grant of power to the Commission, we think it would have done so explicitly. We refuse to impose the limitation.[75]

Agreements for exclusive marketing of specific handsets in supply contracts between equipment vendors and wireless service providers are clearly "exclusive dealing contracts" within the meaning of § 215(c) since they prevent vendors from supplying handsets to other carriers, such as RCA's members, that are subject to the Act.[76] Thus, §§ 211(b) and 215(c) of the Act constitute a congressional delegation of authority to the Commission to examine exclusive dealing contracts between wireless equipment vendors and handset manufacturers to determine whether they have a substantial adverse effect on the provision of wireless telecommunications services or result in an impairment of competition.[77] Because the Commission has specific statutory authority to regulate exclusive dealing contracts, we need not address whether the Commission as Title I ancillary jurisdiction to regulate such contracts.

B. The Commission Has Regulatory Authority Under § 201(b) of the Act

Ignoring the plain language of § 201(b) of the Act, Sprint first argues that the provision applies "only to communications services by common carriers."[78] Sprint then implicitly concedes that § 201(b) also applies to common carrier practices "in connection with" the provision of communications services.[79] Contrary to Sprint's contention, an "equipment supply contract" between a wireless carrier and a handset manufacturer can

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[75] *Id.*, at 731 n.9.

[76] *See* 47 U.S.C. § 215(c).

[77] *See Computer Use of Communications Facilities*, 28 F.C.C. 2d 291, 300-01 (1970).

[78] Comments of Sprint, at 14.

[79] *Id. See* 47 U.S.C. § 201(b).

be evidence of a practice in connection with the carrier's service that is cognizable under § 201(b).[80]

In the first place, *Iowa Utilities Bd.* dispensed with the idea that Congress limited the practices that can be deemed "unjust or unreasonable" to those prescribed under the original provisions of Title II of the Act. The Supreme Court held that § 201(b) gives the Commission the power to enact such rules and regulations as may be necessary to carry out the provisions of the Act, including the provisions that were added by the Telecommunications Act of 1996 ("1996 Act").[81] The Court subsequently found that the fact the 1996 Act rewrote the Act to enhance the role of competition but left § 201(b) in place "indicates that the statute permits, indeed it suggests that Congress likely expected, the FCC to pour new substantive wine into its old regulatory bottles."[82] Thus, it upheld the Commission's determination that a carrier's refusal to divide the revenues it receives from the caller with the payphone operator, despite the Commission's requirement that it do so, was a "practice" "in connection with" the provision of the carrier's long-distance service that was "unreasonable" in violation of § 201(b).[83]

Entering into an exclusive dealing contract obviously can be an unreasonable carrier "practice" that violates § 201(b). The Commission has twice held that exclusive contracts for telecommunications service in a multiple tenant environment ("MTE") "impedes the pro-competitive purposes of the 1996 Act," and thus "a carrier's agreement

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[80] *But see* Comments of Sprint, at 14.

[81] *See Iowa Utilities Bd.*, 525 U.S. at 377-78.

[82] *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S. 45, __, 127 S.Ct. 1513, 1521 (2007).

[83] *See Global Crossing*, 127 S.Ct. at 1520.

to such a contract is an unreasonable practice" under § 201(b).[84] Citing *Cable & Wireless*, the Commission concluded that it had authority under § 201(b) "to regulate the contractual or other arrangements between common carriers and other entities, even those entities that are generally not subject to Commission regulation."[85] Obviously, the Commission can assert its § 201(b) jurisdiction to regulate the exclusive dealing contracts between wireless carriers and handset manufacturers even though the manufacturers are not subject to regulation under the Act.

The fact that a carrier's exclusive dealing contract is a "wholesale supply" contract for customer premises equipment ("CPE") does not deprive the Commission of its regulatory authority under § 201(b).[86] The provision of cellular CPE and cellular service on a "packaged basis" by facilities-based carriers have long been subject to regulation under the just and reasonable provisions of § 201(b), as well as the nondiscriminatory provisions of § 202(a).[87] A carrier's exclusive dealing contract with an equipment vendor that impedes the pro-competitive purposes of the 1996 Act does not escape the Commission's § 201(b) jurisdiction simply because the procurement contract is for cellular CPE.

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[84] *Promotion of Competitive Networks in Local Telecommunications Markets*, 23 FCC Rcd 5385, 5391 (2008) ("*MTE Nonexclusivity II*"); *Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22984, 23000 (2000) (commercial MTEs).

[85] *MTE Nonexclusivity II*, 23 FCC Rcd at 5391.

[86] *But see* Comments of Verizon Wireless, at 7.

[87] *Bundling of Cellular CPE and Cellular Service*, 6 FCC Rcd 1732, 1735 (1991).

C. The Commission Has Jurisdiction Under §§ 1, 4(i), 201(b), 202(a), 253(b)(3), and 303(r) of The Act

The Commission's rulemaking authority under §§ 4(i), 303(r), and particularly 201(b) gives it the power to promulgate rules to carry out any of the provisions of the Act. Therefore, it has the authority to adopt rules to regulate carrier contract practices if it finds that such regulation would carry out its § 1 mandate "to make available, so far as possible, to all people of the United States, without discrimination … a rapid, efficient, nation-wide … radio communication service with adequate facilities at reasonable charges."[88] Because a contract is considered a "device" under § 202(a),[89] the Commission has the authority under § 201(b) to regulate carrier contract practices if to do so would prevent cellular carriers from giving "any undue or unreasonable preference or advantage to any particular person, class of persons, or locality," or from subjecting "any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."[90] Clearly, the Commission has jurisdiction under § 201(b) to adopt rules to prevent carriers from entering into contracts that are discriminatory within the meaning of § 1 and/or § 202(a).

Sprint is plainly wrong to claim that an unreasonable discrimination in violation of § 202(a) requires "discrimination by a carrier between or among its customers in connection with the provision of like communications service."[91] A carrier can engage in

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[88] 47 U.S.C. § 151.

[89] *See Midwestern Relay Co.*, 69 F.C.C. 2d 409 (1978); *Bell System Tariff Offerings*, 46 F.C.C. 2d 413, 432 (1974).

[90] *Id.* § 202(a).

[91] Comments of Sprint, at 14-15.

a practice that unreasonably discriminates without discriminating among its customers. For example, a wireless carrier can violate § 202(a) by refusing "to deal with any segment of the public whose business is the type normally accepted" or declining "to serve any particular demographic group."[92] Moreover, the plain language of § 202(a) prohibits unreasonable discriminations and preferences with respect to any particular "locality."

After the Commission detariffed CMRS and Congress enacted the 1996 Act, the Commission was left with substantial discretion to determine what constitutes unreasonable discriminations or preferences under § 202(a).[93] The generality of the terms Congress employed in § 202(a) "opens a rather large area for the free play of agency discretion."[94] Indeed, the language of § 202(a) "bristles with 'any'" and states the antidiscrimination prohibition in "flat and unqualified" terms.[95] By making it unlawful for "any" carrier to give "any" undue or unreasonable preference or advantage to "any" person by "any" means or device, § 202(a) gives the Commission the authority to examine whether wireless carriers can give themselves an undue or unreasonable competitive advantage by entering into exclusive dealing contracts with handset manufacturers.

The breadth of the Commission's rulemaking authority under § 201(b) permits it to adopt rules to carry out the antidiscrimination provisions of § 202(a) *and* implement

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[92] *Orloff*, 352 F.3d at 420 (quoting *Orloff v. Vodafone Airtouch Licenses LLC, d/b/a Verizon Wireless*, 17 FCC Rcd 8987, 8997 (2002)).

[93] *See id.*, at 420-21.

[94] *Bell Atlantic Telephone Co. v. FCC*, 79 F.3d 1195, 1202 (D.C. Cir. 1996).

[95] *American Trucking Ass'n, Inc. v. FCC*, 377 F.2d 121, 130 (D.C. Cir. 1966).

antidiscrimination principles codified elsewhere in the Act. For example, the Commission possesses the discretion under § 202(a) to adopt a rule that would prohibit any practice by wireless carriers that would subject any community (a locality) to an unreasonable disadvantage by denying it "a fair, efficient, and equitable distribution of radio service."[96] Surely, §§ 201(b), 202(a), and 303(r) authorize the Commission to undertake a rulemaking to examine whether exclusive dealing contracts between wireless carriers and handset manufacturers could produce unreasonable discriminations by preventing the fair, efficient, and equitable allocation of CMRS among the "several States and communities."[97]

It is now settled that the Commission's rulemaking authority under § 201(b) extends to carrying out the provisions of the 1996 Act, including the statute's universal service principles.[98] Consequently, the Commission has the discretion to prohibit practices of wireless carriers under § 202(a) that place consumers at an unreasonable disadvantage in terms of such principles. A carrier practice could be deemed to violate § 202(a) by subjecting a region (a locality) to an unreasonable disadvantage by denying it access to advanced telecommunications services,[99] or by denying "low-income consumers" (a class of persons) or those in a "rural, insular, and high cost" area (a locality) access to advanced telecommunications "that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably

[96] 47 U.S.C. § 307(b).

[97] *Id.*.

[98] *See* 47 U.S.C. § 254(b).

[99] *See id.* § 254(b)(2).

comparable to rates charges for similar services in urban areas."[100] Clearly, the Commission has jurisdiction to determine whether the practice of wireless carriers of entering into exclusive dealing contracts with handset manufacturers subjects consumers to an unreasonable disadvantage under § 202(a) by denying them access to advanced telecommunications services consistent with the universal service principles of § 254(b).

Sprint's jurisdictional quibbles "confound[] the very purpose of agency delegation — institutionalization of authority to fashion policies and programs that implement broad legislative mandates in presently unforeseeable circumstances."[101] Congress did not envision the rapid development of the innovative features of today's handsets or the competitive implications of exclusive dealing contracts with handset manufacturers. However, Congress delegated a breadth of authority to the Commission sufficient to allow it to engage in a rulemaking simply to determine whether regulatory actions need be taken to ensure that the practice of entering into such exclusive dealing contracts do not violate the nondiscriminatory policies of §§ 1, 254(b), and 307(b), as well as the nondiscriminatory provisions of § 202(a).

D. The Commission Has Already Assumed Jurisdiction Over Exclusive Dealing Contracts For Cellular CPE

In federal administrative law terms, subject-matter jurisdiction simply refers to an agency's statutory power to regulate.[102] The Commission has already decided that it has the statutory power to regulate exclusive dealing contracts between cellular carriers and handset manufacturers.

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[100] *Id.* § 254(b)(3).

[101] *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036, 1051 (4th Cir. 1977).

[102] *See Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374-75. *Cf., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1989).

AT&T chastises RCA for failing to "mention that the Commission has *already rejected*, in 1992, small carrier requests that it apply heavy-handed regulation to their larger rivals' exclusive handset offerings."[103] In point of fact, two resellers alleged that facilities-based cellular carriers had entered into exclusive dealing agreements with CPE providers,[104] but it was the Independent Data Communications Manufacturers Association ("IDCMA") that urged the Commission in 1991 to adopt regulatory safeguards to prevent against the potential anticompetitive effects of such agreements.[105] The Commission declined to adopt the proposed safeguards for reasons unrelated to its jurisdiction or the anticompetitive effects of exclusive dealing agreements on competing carriers and rural consumers.

In 1992, the Commission found that the adoption of IDCMA's safeguards was not warranted because there was "no evidence that cellular carriers refused to provide service to customers that purchase another brand of CPE."[106] The Commission reasoned that "if one carrier managed to eliminate all agents and offered a bundle of service and on CPE manufacturer's CPE, a customer could always go elsewhere or to another carrier to get CPE."[107] Moreover, the Commission found that it would be "highly unlikely" that "a future exclusive dealing arrangement could be successful in eliminating a CPE

[103] AT&T Comments, at 8 (emphasis in original) (citing *Bundling of Cellular Customer Premises Equipment and Cellular Service*, 7 FCC Rcd 4028, 4030 (1992) ("*Cellular CPE Bundling*")).

[104] *See Cellular CPE Bundling*, 7 FCC Rcd at 4030 & n.27.

[105] *See id.*, at 4030.

[106] *Cellular CPE Bundling*, 7 FCC Rcd at 4030.

[107] *Id*.

manufacturer."[108] However, the Commission promised "if in the future, it comes to our attention that carriers' exclusive distribution agreements with CPE manufacturers are resulting in anticompetitive abuse, we will not hesitate to revisit this area."[109]

The Commission obviously did not decide in 1992 that it was without jurisdiction to regulate exclusive dealing arrangements with cellular CPE manufacturers. It simply decided that there was no need for it to exercise its jurisdiction. Now that RCA has produced evidence that the exclusive dealing contracts between wireless carriers and handset manufacturers are impeding the pro-competitive policies of the 1996 Act, the Commission should exercise its jurisdiction to revisit the issue in a rulemaking.

VI. CORRECTIVE COMMISSION ACTION NOW WILL SIGNIFICANTLY BENEFIT THE FUTURE DEVELOPMENT OF ADVANCED WIRELESS SERVICES

Multiple commenters state that another negative consequence of the growing trend toward handset exclusivity arrangements is the limited ability of smaller carriers to acquire handsets for use on AWS spectrum.[110] The availability of handsets that are able to operate on LTE technology in the future will be critical to all smaller carriers who attempt to compete with the national wireless carriers and offer 4G services. RCA is concerned that the nation's largest carriers, who are able to dictate the terms and types of phones they want to purchase, may decide to steer handset manufacturers to support only the particular frequencies, air interfaces and spectrum bandwidths held by the largest carriers. This could in turn limit the ability of smaller carriers to deploy these handsets.

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[108] *Id.*

[109] *Id.*

[110] *See e.g.,* Comments of MetroPCS Communications, Inc., at 11-12; Comments of TCA, Inc., at 2-3.

The largest carriers must not be allowed to use their market power to deny competitors access to LTE handsets. As noted by MetroPCS, if Verizon Wireless and AT&T steer the handset manufacturers to deploy LTE only in configurations suited to their particular spectrum holdings, and then enter into exclusive arrangements, this could limit the ability of small, rural, and regional carriers to deploy these handsets on their frequencies.[111]

As noted by TCA, Inc., the developments surrounding T-Mobile's Android phone, "may be an unsettling indication of how advanced wireless services… will become one more arena where large wireless carriers exercise "absolute control over the market availability of a particular handset."[112] Thus far, no other carrier has been able to offer an Android-based handset due to the exclusive arrangements that benefits T-Mobile and while there are reports of other handsets to be developed and powered by Android, these too, will seemingly be offered only through large wireless carriers.[113]

This anticompetitive environment is toxic to smaller carriers planning to provide advanced wireless services to the communities they serve. By way of example, Cincinnati Bell Wireless states that its ability to deliver advanced broadband wireless services to consumers is severely hampered by the limited number of 3G handsets available using the AWS spectrum. Cincinnati Bell Wireless and T-Mobile provide service in the same bands for both GSM and AWS spectrum. However, because T-Mobile has entered into exclusive handset deals with Nokia, Samsung, and other

[111] Comments of MetroPCS Communications, Inc., at 11.

[112] Comments of TCA, Inc., at 2.

[113] *See* Comments of TCA, Inc., at 2 (citing Martin Perez, *T-Mobile Confirms G1 Successors*, Information Week, Jan. 30, 2009 ("Samsung is reportedly readying an Android phone… and it will be available for T-Mobile and Sprint in the first half of the year [2009]")).

manufacturers, Cincinnati Bell Wireless' ability to get an adequate inventory of 3G handsets is compromised.[114] In fact, Cincinnati Bell Wireless estimates that because of T-Mobile's exclusive handset arrangements, it will have 35,000 fewer 3G handsets than it will need to meet projected demand from June through October 2009.[115] Further, Cincinnati Bell Wireless reports that it will be forced to activate more GSM handsets onto its GSM network, rather than migrating customers to its 3G network – a move that results in considerably higher capital costs.[116] Thus, not only will Cincinnati Bell Wireless have spent millions of dollars on buying and building out the AWS spectrum, but exclusive handset arrangements will cause Cincinnati Bell Wireless to suffer considerable economic harm on two fronts – first, lost revenue from customers who want advanced wireless/3G services that Cincinnati Bell Wireless cannot provide without an adequate supply of 3G handsets and, second, the additional capital costs associated with supporting customers on the GSM network.[117]

If small, rural and regional carriers are unable to buy handsets with 4G technology, such as LTE, they will be severely harmed in the future as they will not be able to compete against the largest carriers who already have access to more capital and, in some cases, better resources. Advanced wireless services – 3G and beyond – will only flourish if the Commission takes action now that prohibits such exclusive arrangements.

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[114] *See* Comments of Cincinnati Bell Wireless, at 5.

[115] *Id.*

[116] Cincinnati Bell Wireless estimates that its capital expenditure per incremental minute of use per month on the GSM network to be nearly twice that of its 3G/AWS network. *Id.*, at 6. And adding even more costs, Cincinnati Bell Wireless states that it may be required to lease additional spectrum in the PCS band to augment GSM network capacity in order to meet consumer demand (assuming such spectrum is available to be leased), demand which would otherwise be shifted to the AWS/3G network. *Id.*, at 6.

[117] *Id.*

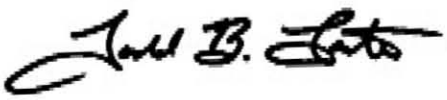
VII. CONCLUSION

Smaller carriers need access to the same handsets as the largest carriers in order effectively compete with them. The Commission should take corrective action that allows smaller carriers to operate on a more level playing field as the larger carriers. As noted in one pleading, "to allow such [exclusive handset] agreements to remain in place is no different than permitting cable television service providers to enter into exclusivity agreements with flat screen TV manufacturers such that customers could only purchase a certain type of flat screen TV if they took video service from a certain provider"[118] Such a market dynamic would be unfathomable in the cable and consumer electronics industries, but this is the current situation in the wireless industry.

Based upon the information provided to the Commission in this proceeding by those in support of *and opposed* to the RCA petition, the Commission should initiate a rulemaking to investigate the anticompetitive effects of exclusivity arrangements between commercial wireless carriers and handset manufacturers. RCA believes strongly that following its investigation, the Commission will conclude that the public interest is, in fact, being harmed by these arrangements. Given the gravity of the harms allegedly caused by these agreements, if that determination is made, the Commission must then promptly adopt rules that prohibit such arrangements consistent with the Commission's obligations under the Act.

[118] Comments of RTG, OPASTCO and NTCA, at 4.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Donna L. Brown, hereby certify that on this 20th day of February, 2009, copies of the foregoing reply comments were sent by e-mail, in pdf format, to the following:

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